No. 2791

United States

Circuit Court of Appeals

For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913, *Appellant*

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Interveners, *Appellees*

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Intervener, *Appellant*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, and WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, Interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913, *Appellees*

AMERICAN WATER WORKS AND ELECTRIC COMPANY, the INTER-MOUNTAIN ELECTRIC COMPANY, THE THOUSAND SPRINGS POWER COMPANY and the GUARANTY TRUST COMPANY OF NEW YORK, GENERAL CREDITORS OF GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, *Appellants,*

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Petition of the Equitable Trust Company of New York for Rehearing.

Upon Appeals from the United States District Court for the District of Idaho, Southern Division

MURRAY, PRENTICE & HOWLAND,
Residence: New York City.
RICHARDS & HAGA,
J. L. EBERLE,
Residence: Boise, Idaho.
Solicitors for Petitioner The Equitable Trust Company of New York.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

Petition of the Equitable Trust Company of New York for Rehearing.

To the HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT:

Your petitioner, The Equitable Trust Company of New York, appellant in the above entitled cause, respectfully petitions this Honorable Court to grant a rehearing in said cause. And your petitioner especially claims error in the decision filed herein in the following particulars:

1. The Court has construed Sections 3408 and 4111 of the Idaho Revised Codes so as to authorize general creditors to intervene in mortgage foreclosure suits with the right to contest the validity of a chattel mortgage valid between the parties, whereas the Supreme Court of the State has repeatedly held that a general creditor of a common debtor cannot intervene in a foreclosure suit for such purpose, or any purpose, but that such a contest can only be made by a subsequent purchaser or mortgagee or a creditor who has acquired a lien upon the property by execution, attachment, or some legal process against the specific property involved in the foreclosure suit;

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and such construction has been given to similar statutes by the Supreme Courts of other States and approved by the Supreme Court of the United States, particularly in *Smith* vs. *Gale*, 144 U. S. 509, 36 L. Ed. 521.

2. The Court construed Section 3418 of the Idaho Revised Codes as sustaining the rights of the appellees in this cause, whereas that section applies only to foreclosure of chattel mortgages by affidavit delivered by the mortgagee to the sheriff, directing the sale of the property by the sheriff without the institution of a suit by the mortgagee, and it has no application whatever to appellees in this cause; and the decision of this Court in that respect is contrary to both the statutes and the decisions of the highest court of the State of Idaho.

3. The Court seemingly overlooked the fact that the Receiver had been appointed in a general creditors' suit and that he was *not* receiver in the mortgage foreclosure suit, but had possession of the property under his appointment in the general creditors' suit, and was made defendant in the foreclosure suit, to the end that this possession might be decreed subject to the superior rights of the mortgagee under the mortgage lien, and the Receiver could obviously be required to surrender to the Special Master for sale under the decree only such property as was covered by the mortgage lien; the remainder of the property of the solvent debtor would necessarily remain in the possession of the Receiver for the pro rata benefit of all general creditors for whom he was

acting, and no preference right to such general assets not covered by the mortgage could be acquired by any general creditor intervening in the foreclosure suit; for clearly the Court in the foreclosure suit could not reach any property except what was covered by the mortgage; the remainder would remain in the possession of the Receiver, as theretofore, under the order in the general creditor's suit appointing him Receiver for the benefit of all creditors.

4. The Court erred in not passing upon the right of the Receiver to contest the validity of the mortgage as to the property in question on behalf of all creditors, and in apparently overlooking that question in the record, it appearing from the record that the Receiver made the same defense to the validity of the mortgage as did the appellees, whose claims were sustained (Rec. pp. 181-182). And your petitioner, if it is denied a lien on the property as mortgagee, respectfully insists that the Receiver should be awarded the property so that it may be distributed in the general creditors' suit pro rata between all creditors, including your petitioner as the holder of a claim for deficiency.

5. The Court has seemingly overlooked the appeal taken on behalf of a number of general creditors, including the Intermountain Electric Company, the Thousand Springs Power Company, and the Guaranty Trust Company of New York, on behalf of themselves and all other general creditors of said Great Shoshone and Twin Falls Water Power Company, which appeal was allowed by this Court and

is covered by a supplemental transcript of the record. No reference is made to said appeal in the decision, but it is expressly stated in the decision that none of the general creditors, except the American Water Works and Electric Company sought to intervene in the trial court, thus leaving the inference that they were fully protected, whereas the record is undisputed that a majority of the general creditors, including your petitioner on its claim for deficiency, will receive practically nothing on their claims while the appellees, who are also general creditors, will be paid in full.

6. That the decision in this case establishes the impossible rule that general creditors must separately and individually intervene in foreclosure suits, and that a foreclosure suit may thus be converted into a suit not only against the mortgagor and those having any specific claim in or to the property, but also against all general creditors of the mortgagor and claimants to the property.

7. The decision establishes the unprecedented rule that where a receiver has been appointed in a general creditors' suit and an independent suit of foreclosure is afterwards brought, the creditors who have proved their claims in the receivership suit must intervene in the foreclosure suit in order to protect their rights, and that they must at their peril keep informed as to all litigation outside of the general creditors' suit affecting the common debtor, for if they fail to intervene in any suit, even though they have no notice of its pendency, within such time as

the court deems proper, they are forever barred from sharing in the fruits of the litigation.

8. The Court has assumed that the right of intervention in a Federal Suit in Equity is governed by the statutes of the State and not by the Equity Rules and Federal equity practice.

9. Your petitioner should not be deprived of its right to share with the unsecured creditors on its claim for deficiency, and as it is not guilty of any laches, misconduct or failure to assert its rights to the property awarded to the few creditors who intervened in the foreclosure suit, it should be allowed its pro rata share of what is denominated the "Unsecured Creditors' Fund." The fact that it unsuccessfully claimed the property under its mortgage does not bar it from asserting its right as a creditor on an equality with the intervening creditors.

ARGUMENT

The opinion rendered by this Court shows clearly that the lengthy discussions in the briefs of counsel of subjects having only a collateral or indirect bearing on the questions involved has served simply to confuse the court as to the main issues involved, and the garbled extracts from Idaho decisions in appellees' briefs has seemingly led the court into a construction of the Idaho statutes so clearly contrary to the construction given them by the Supreme Court of the State that we cannot in fairness either to our clients or the Court do otherwise than call the matter to the Court's attention in a petition for rehearing;

and we believe that a re-examination of the record and the Idaho statutes and decisions will show that there is ample grounds for granting a rehearing and finally sustaining the contentions of this appellant.

As the decision now stands, this Court has sustained our contention that the trial court did not correctly apply established principles of equity governing cases of this kind, and that the decision of the trial court, therefore, rested upon principles that were fundamentally unsound. But the court has gone further and beyond the contention of any of the parties, and held that the trial court was wrong in its construction of the State statutes and decisions, thus leading to the unusual situation that this Court has sustained the decree of the trial court though it has held that the trial court was wrong on every point discussed in its opinion and upon which it rested its decision.

The trial court held:

(a) That a general creditor did not under the Idaho statutes have the right (1) to intervene in a foreclosure suit; and (2) to be heard to question the validity of the mortgage, but that in order to so intervene and challenge the validity of the mortgage it was necessary to have a specific interest in or lien upon the mortgaged premises (Record p. 182).

(b) That the appellees, because they had filed their claims in the general creditors' suit and obtained the allowance thereof even though *ex parte* and without notice to other creditors, had acquired an interest in or lien upon this specific property

sufficient to enable them to contest the mortgage and intervene in the foreclosure suit, basing this erroneous conclusion upon the misapplication, if not a misconstruction, of a Federal decision by Judge Taft, a decision of the Supreme Court of the United States, and one of the Supreme Court of California resting upon insolvency statutes and having no application to general creditors' suits (Record pp. 183-184).

Our main contention on this appeal was to show that the court was wrong in its decision on the point stated in paragraph (b) above, as that was the basis of the trial court's decision, and if it was wrong on that point a reversal of its decision, we believed, would necessarily follow. As to that contention, this court has said (p. 10):

> "We readily concede that none of the intervening creditors of the insolvent corporation had or acquired any lien on any of its personal property."

And again, on our contention that there could be no preference between general creditors, this Court said (p. 15):

> "Where he is not appointed for the purpose of impounding it for a specific purpose, the appointment of a receiver of property by a Federal Court is for the protection and preservation of all rights and interests therein existing at the time of such appointment.
>
> "Authorities to this effect are so numerous that we think it is unnecessary to cite them."

The foregoing propositions having been decided against appellees, the entire basis of the decision of the lower court was removed and a reversal would have necessarily followed, except for the fact that this Court then proceeds further to hold that the trial court was also wrong on the proposition stated in paragraph (a) above, viz., that under the Idaho statutes a general creditor could neither intervene in a foreclosure suit nor challenge the validity of a chattel mortgage, that was valid between the parties, under Section 3408 of the Revised Codes.

It follows from the foregoing that this Court, as stated above, has decided against the trial court on every point upon which its decision rested, and still sustained the decision. While this may occasionally happen, we feel keenly that this Court has misconstrued the Idaho statutes and Idaho decisions, and our contentions are supported by the decision of the learned trial Judge, and because of his long residence and extended experience at the bar in the State of Idaho and his familiarity with its statutes and decisions his views on local law should be entitled to even more than the usual consideration.

As a further general observation on the decision, we are impressed with the fact that the Court must have labored under a misapprehension of the facts disclosed by the record and the supplemental record of certain appellants. We have here two wholly independent suits, one commenced by Guy I. Towle, a general creditor, on behalf of himself and all other general creditors, for the appointment of a Receiver

of all the property, rights and assets of the debtor (Great Shoshone and Twin Falls Water Power Company). A receiver was appointed and he immediately took possession of all the property, including what is involved in this litigation. While the receiver was thus in possession of such property, this appellant commenced a suit to foreclose a mortgage covering, as it believed, all the property in the possession of the Receiver, and it therefore made the Receiver a party defendant in the foreclosure suit. Manifestly, it could not disturb the possession of the receiver except as to property on which it had a lien prior or superior to the claim of the receiver.

In the foreclosure suit the only question that could be involved or determined was the extent of the mortgagee's lien, or the property that would be subject to that lien, and the right of the mortgagee to take from the possession of the receiver and sell under its mortgage would necessarily be limited to the property subject to the mortgage lien. All other property must obviously be left in the possession of the receiver, who held it not by any order or right given him in the foreclosure suit, but under the orders made in the general creditors' suit. The Trial Court, however, allowed the plaintiff in the general creditors' suit and three other creditors, who had *ex parte* obtained the allowance of their claims before any time had been fixed within which creditors might object to each others' claims or submit their claims for final approval, to intervene in the foreclosure suit without notice to other creditors; and

these creditors were in effect awarded, in the foreclosure suit, property in the possession of the receiver in the general creditors' suit and over which the court had held the mortgage did not extend.

We think this is impossible under any theory of sound reasoning or sound law. Clearly there seems to have been a confusion of rights and a confusion of suits, for manifestly what the mortgagee could not take away from the receiver by its mortgage must remain in his possession as receiver in the general creditors' suit, and be held and disposed of by him for the benefit of the creditors for whom he was acting under his order of appointment.

With these general observations, we pass to a consideration of some of the matters discussed in the opinion filed by this Court.

Right to Intervene in Federal Suits in Equity is Not Controlled by State Statutes

The right of intervention is discussed by the Court with reference to the local law. The Court was seemingly led into this error by the discussion of the subject from this viewpoint by appellees in their brief, and substantially no attention was given to that question by this appellant for the reason that the right to intervene had apparently little or no bearing on the case. Our contention was that under Section 3408 of the Revised Codes no one, whether a party to the suit from the beginning or made so by intervention, could contest the validity of the mortgage, except a purchaser or creditor having a lien

or claim against the specific property involved in the suit. This was based upon the substantive law of mortgages in the State of Idaho, and not upon rules of pleading or general statutes relative to intervention.

Section 3418 Has No Application to This Suit

The Court quotes Section 3418, which was urged by appellees in their brief as supporting their contentions, and which reads as follows:

> "The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing, for which purpose an injunction may issue if necessary."

While we shall show later that even under this statute the contest cannot be made except by one who has a specific claim to or lien upon the property involved, the fact remains that this section has not the slightest bearing upon the questions involved, for it relates to another form of foreclosure, viz., the foreclosure of chattel mortgages by affidavit delivered by the mortgagee to the sheriff with instructions to seize the property and sell it without the formality of a suit of foreclosure being brought.

Section 3412 of the Idaho Revised Codes reads as follows:

> "Any mortgage of personal property, when the *debt* to secure which the mortgage was given is due, may be foreclosed *by notice and sale as*

> *hereinafter provided*, or it may be foreclosed by action in the district court having jurisdiction in the county in which the property is situated." (Our italics.)

This section is followed by Sections 3413, 3414, 3415, 3416, 3417 and 3418, dealing with the sale of property by the sheriff under the first method of foreclosure referred to in the above section. The alternative method of foreclosure by suit in court is not referred to in this title (Civil Code) but is prescribed in the Code of Civil Procedure. And Section 3418 simply permits a creditor having the necessary interest to bring suit to enjoin the sheriff from selling the property under the first method of foreclosure described in Section 3412. For manifestly the parties are entitled to a hearing before the property is sold, but there could be no occasion for an independent action enjoining proceedings in a foreclosure suit; if the parties have any right to the property involved they should intervene in the foreclosure suit.

Right to Intervene Only Remotely Involved

The Court next quotes Section 4111 relative to the right of parties to intervene generally in pending suits, but, as stated above, this would seem to have no bearing on this case, for it relates exclusively to matters of pleading by parties in intervention, and in no way modifies the substantive law of mortgages as set forth in Section 3408.

Construction By Idaho Supreme Court of Statutes Involved Here

The Court cites Union Trust and Savings Bank vs. Idaho Smelting & Refining Company, 24 Ida. 735, as authority for the right of appellees to intervene in the present suit. We think neither the statute nor the decision has any bearing upon the right of intervention in Federal courts of equity; but even assuming that they have, the decision referred to can not possibly help the appellees. In that case Section 3408 of the Revised Codes *was not involved, and was not cited or referred to*, and the creditors who sought to intervene had obtained *judgments* which they alleged were *liens upon the property of the judgment debtor which had been transferred to the Idaho Smelting & Refining Company*, as they claimed, in violation of a constitutional provision prohibiting "the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges." (Sec. 15, Art. II, Idaho Constitution.)

It appeared in that suit that the debtor, the Coeur d'Alene Smelting Company, had suits pending against it when it transferred all its property to the Idaho Smelting & Refining Company, which had an outstanding mortgage or trust deed to the Union Trust & Savings Bank on all of its property, including after-acquired property. Later the pending

suits resulted in judgments against the Coeur d'Alene Smelting Company, and thereafter the Union Trust & Savings Bank commenced a suit to foreclose against the Idaho Smelting & Refining Company, seeking to impress the lien of its mortgage upon the property which the latter had received from the Coeur d'Alene Smelting Company; and the judgment creditors of the Coeur d'Alene Smelting Company sought to intervene and to have their judgment liens impressed on that property ahead of the mortgage lien. They sought also to contest the validity of the mortgage on the ground that the bonds thereunder had been issued in violation of another section of the Idaho Constitution, viz., Section 9 of Article XI, which provides that "No corporation shall issue stocks or bonds, except for labor done, services performed, money or property actually received; and all fictitious increase of stock or indebtedness shall be void."

We think no one would question the right of these judgment creditors to intervene in that suit if they observed the usual rules of pleading; and in any event, the decision, as stated above, does not even purport to construe Section 3408 relative to chattel mortgages as to the interest which a party must have in the property before he can take advantage of the irregularity in the execution or filing of the mortgage.

This Court next refers to the case of Neustadter Bros. vs. Doust, 13 Ida. 617, and says that case "is wholly unlike the present one." And, further,

> "We do not understand the case last cited to hold that under the provisions of the Idaho statute that has been cited a chattel mortgage, unaccompanied by the affidavit of good faith and not recorded as required by the State statute, is valid as against all creditors of the mortgagor, except such as have a lien upon the property;"

And further, that there is nothing inconsistent between the case last cited and that of Union Trust & Savings Bank vs. Idaho Smelting & Refining Company, *supra*. Clearly there can be nothing inconsistent between the two cases, for the Union Trust & Savings Bank case dealt solely with the question of pleadings in intervention, while the Neustadter case *did not involve intervention at all*, but was a suit brought under Section 3418 of the Idaho Codes to enjoin a sheriff from selling personal property under the foreclosure of a chattel mortgage by affidavit placed in the hands of the sheriff with instructions to seize and sell the property. The Neustadter case, however, so clearly lays down the interest which a creditor must have in the property covered by mortgage before he can contest the validity of the mortgage, either under Section 3418 or 3408, that it is directly in point in this case and conclusively settles the substantive law of the State in favor of this appellant and against the appellees.

This Court apparently fell into the error of accepting the quotation in appellees' brief from the de-

cision of the Neustadter case and did not notice that it was not even *obiter dictum* but was simply a general criticism of what the complaint did not contain, with some general observations as to what it should have contained. The heart of the decision is found in what was not quoted in appellees' brief, and in what is not quoted in the decision of this Court. After the court had criticized the pleading of the plaintiffs in the injunction suit against the sheriff it went on to show that it would be impossible for plaintiffs under any circumstances to state a cause of action, for the reason that they did not have such interest or lien in or against the specific property foreclosed upon as to entitle them to contest the mortgage.

We especially desire to call the Court's attention to what was really decided in the Neustadter case, and that follows immediately after the quotation in appellees' brief and the quotation set out in the decision. The Court said:

> "This action is brought by the plaintiff to restrain the sheriff under the provisions of Section 3396, Revised Statutes, (now Section 3418, Revised Codes), which is as follows: 'The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the district court by any person interested in so doing, for which purpose an injunction may issue if necessary.' It will be noticed from the foregoing section that the right of the mortgagee to foreclose his mortgage and sell the property covered by it, may be contested by

'any person interested in so doing.' The question arises as to whether a general creditor who has no lien upon the property either by contract or by judgment, and who in no way connects himself with an interest in the property by lien or attachment, is an 'interested party' within the meaning of this statute. The courts seem to have quite generally held that such a general creditor is not an interested party. It was held in an opinion by Mr. Justice Field of California, in the case of Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569, that in order for a person to be an 'interested party' so as to entitle him to intervene under a statute which authorized 'interested persons' to intervene, that his interest 'must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation. A simple contract creditor of a common debtor cannot intervene in a foreclosure suit.' The foregoing case seems to have been frequently cited with approval and followed, as will be seen from 1 Cal. Notes, 578.

"In Howe v. Cochran, 47 Minn. 403, 50 N. W. 368, the Supreme Court of Minnesota, in considering the right of a general creditor to contest the validity of a chattel mortgage, said: 'The defendants were not in position to question the *bona fides* of the mortgage to the plaintiff. It is only a subsequent purchaser or mort-

gagee or a creditor who has laid hold of the mortgaged property by legal process who on that ground can object that the mortgage is invalid.'

"In People's Sav. Bank v. Bates, 120 U. S. 556, 30 L. Ed. 754, 7 Sup. Ct. Rep. 679, a case that was taken up from the State of Michigan to the Supreme Court, it is said: 'A creditor at large cannot attack a chattel mortgage as fraudulent until he has obtained judgment, execution or some legal process against the mortgaged property.' The Supreme Court cites and reviews a number of cases in support of this position.

"In West Coast Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35, the supreme court of Washington had under consideration Section 1656 of the Code of that state, which is to the same effect and in part identical with our Section 3396, and held that, before a creditor could be heard to contest the foreclosure, he must show 'an interest in the subject matter.' (Rockford Watch Co. v. Rump, 12 Wash. 647, 42 Pac. 213; Yetzer v. Young, 3 S. Dak. 263, 52 N. W. 1054; Fearey v. Cummings, 41 Mich. 376, 1 N. W. 946; McCormick Harvesting Machine Co. v. De La Mater, 114 Iowa, 382, 86 N. W. 365; Street v. Oliver, 56 Iowa, 744, 10 N. W. 276; Treanor v. Bank, 90 Iowa, 575, 58 N. W. 914.)

"It would seem from the foregoing authori-

ties that even if the plaintiff had otherwise pleaded a good cause of action, he would still not be within the purview of the statute, in that he in no way connects himself with an interest in or claim upon the property about to be sold. When he prosecutes his action, and seeks to enjoin a sheriff from the discharge of his official duty under process delivered him, the plaintiff should be required to state a good cause of action, and connect himself with such an interest as would entitle him to relief before being allowed to proceed further. Such has not been done in this case, and the demurrer was properly sustained. If the plaintiff conceived that this mortgage was absolutely void, or that any part of the property offered for sale by the defendant sheriff was not covered by the mortgage, he had an ample, plain, and speedy remedy at law by attachment. The judgment is affirmed, with costs in favor of respondent."

In view of what is said in the above quotation we do not see how it is possible for this Court to say that the Idaho court in that case held that a general creditor could intervene in a foreclosure suit and contest the mortgage, or that it did not hold anything to the contrary. The conclusion of the court is certainly summed up in the last paragraph, after it has reviewed the authorities, viz.:

"*That even if the plaintiff had otherwise pleaded a good cause of action, he would still*

not be within the purview of the statute, in that he in no way connects himself with an interest in or claim upon the property about to be sold." (Our italics.)

And further,

"*If the plaintiff conceived that this mortgage was absolutely void, or that any part of the property offered for sale by the defendant sheriff was not covered by the mortgage, he had an ample, plain and speedy remedy at law by attachment.*" (Our italics.)

Clearly the Supreme Court held in the above case that a general creditor could not contest a mortgage, and the decision of this court is certainly in direct conflict with the decision of the highest court of the State. The Trial Court so understood the Idaho decisions and statutes, for it did not cite any of these decisions in support of its own decision, but, on the contrary, it attempted to rest its decision upon the erroneous doctrine of general creditors obtaining a lien upon the property through the filing and approval of their claims in the general creditor's suit.

This Court next refers to the case of Ryan vs. Rogers, 14 Ida. 309, and Martin v. Holloway, 16 Ida. 513, and says that they are not inconsistent with what this Court has said in its decision. Again we think the Court has been misled by the garbled statements and dicta from these decisions quoted in the brief of appellees.

In Ryan v. Rogers the Trustee in Bankruptcy brought the suit against the mortgagee and the sheriff and contended that the mortgage was absolutely void. The mortgage covered a stock of merchandise and the mortgagee permitted the mortgagor to remain in possession of the property and to sell and dispose of the goods in the usual course of business without applying the proceeds of sale upon the mortgage debt. The court says, after referring to these facts and decisions relative to such mortgages:

> "Notwithstanding these facts, however, the mortgage would be good as to any remaining property covered by it as between the mortgagor and mortgagee, *in the absence of attachment or other lien or encumbrance prior to the mortgagee taking possession.* (Citing cases.)
>
> "In this case the mortgagee took possession of the remaining property covered by the mortgage prior to any *creditors' rights initiating by reason of an attachment lien or other encumbrance on the property whereby a general creditor could bring himself within the purview of the statute and acquire a right to contest the mortgage.* (Neustadter Bros. v. Doust, 13 Ida. 617, 93 Pac. 978.) *Possession of the remaining mortgaged property having been taken by the mortgagee prior to the rights of any creditor attaching thereto, the mortgagee would be exempt from the application of the general rule.*" (Our italics.)

Clearly the court held and decided in that case that the right of a creditor to question a mortgage could not be initiated except by the acquisition of some lien. If a general creditor could make the contest, why have the courts invariably determined the relative rights of the parties with reference to the date of possession by the mortgagee and the date of the attachment or levy under execution by the creditor? Manifestly, these courts have all been wrong if this Court is correct in its construction of the Idaho statutes, for it has always been held that where the mortgage was irregular and was subject to contest the mortgagee could protect himself by obtaining possession of the mortgaged property before the creditors acquired some lien by *attachment or levy.*

We agree with the court that there is nothing inconsistent between the decisions in Neustadter Bros. vs. Doust and Ryan vs. Rogers, but neither decision has anything in common with Union Trust & Savings Bank vs. Idaho Smelting & Refining Company.

In Martin vs. Holloway, 16 Ida. 513, 520, the court quotes with approval the foregoing from Ryan vs. Rogers, and adds:

> "In that case this court held that while it would, as a matter of law, be a fraud upon attaching creditors, and avoid the mortgage where the mortgagor was permitted to remain in possession of the stock of merchandise, where the stock was double the value of the debt, and continue to sell such stock in the ordinary course of trade long after the debt matured, *still where*

the possession of such property was surrendered to the mortgagee prior to the date attaching creditors' rights attached, the possession of the mortgagee would be exempt from the application of the general rule." (Our italics.)

The court then reviews the authorities on the right of the mortgagee to take possession and thereby make his mortgage good when it would otherwise have been subject to contest, and then adds:

"We believe the rule announced in this case is correct, and that where a chattel mortgage is valid between the parties, even though for some reason it be void as to creditors, yet if the property be delivered to the mortgagee prior to the time any *specific right or lien* upon the property is acquired by a creditor, the possession of such mortgagee is valid, and may be maintained and the property sold under the provisions of such mortgage. * * * A general creditor has no more right to the property than the mortgagee, even though the mortgage be void as to creditors. Either may procure a lien upon such property in any method known to the law, and if a mortgagee takes possession of the mortgaged property, even under a mortgage void as to creditors, his possession cures such defect and gives him the right to maintain such possession as security for his debt, and if this is done with the consent of the mortgagor *prior to the time the general creditor secures an*

> *attachment, the mortgagee's right becomes prior to that of the attaching creditor.*" (Our italics.)

We submit that the Idaho decisions must be construed as holding that the right of a creditor to contest a mortgage arises when he obtains a lien by attachment or levy upon the property, and not before. That was the construction placed upon these decisions by the learned trial Judge, and we think it is settled law not only in the State of Idaho but in practically every jurisdiction where the substantive law as to mortgages is substantially as it is in this State. Some of the courts have considered it solely from the standpoint of the general right to intervene in litigation, and others have based it upon the mortgage statutes similar to Section 3408 of the Idaho Codes.

The leading case on the subject is Horn vs. Volcano Water Co., 13 Cal. 62. This has been cited and approved in nearly all the western States, by this Court, and by the Supreme Court of the United States in Smith v. Gale, 144 U. S. 509.

Horn vs. Volcano Water Co., *supra*, was first approved by the Idaho Supreme Court in 1869 in People vs. Green, 1 Ida. 235. In that case the Idaho Supreme Court in discussing the right to intervene, said:

> "The right to intervene has been taken from the Code of Louisiana, and adopted into our practice. It is not every kind of interest which

will entitle a party to intervene. *The true rule is laid down by Chief Justice Field in Horn vs. Volcano Water Co., 13 Cal. 62.*" (Our italics.)

A rather full review of the authorities will be found in First National Bank of Las Vegas v. Clark (N. M.) 153 Pac. 169.

The Supreme Court of South Dakota, in Yetzer vs. Young, 3 S. D. 263, 52 N. W. 1054, a case frequently cited by other courts, had before it *a case where a general creditor sought to intervene in a foreclosure suit.* The court said:

"The first question presented is as to the qualifications of an intervener. Our statute respecting intervention, when and how it may take place, is the same as that of California, and practically like that of Minnesota and Iowa. Any person may intervene 'who has an interest in the matter in litigation,—in the success of either party.' Appellant contends that as a simple judgment creditor she had such 'an interest in the matter in litigation' as entitled her to intervene, the argument being that the object of plaintiffs' action was to get possession of the goods, to appropriate them to the payment of their alleged mortgage, and thus reduce and divert the fund out of which she might otherwise collect her judgment, and that she was directly interested in preventing this. The subject matter of the litigation was plaintiffs' right to take the goods under their mortgage.

It went only to the possession. In this question appellant could not be concerned, unless she had some interest in the goods that might be affected by such change of possession. We do not think appellant's interest as a general judgment creditor, either in the matter in litigation or in the goods, was sufficiently direct or immediate to entitle her to intervene. Upon this point the case of Horn v. Water Co., 13 Cal. 62, is instructive. * * *

"The 'matter in litigation' in the original action in which appellant sought to intervene was plaintiffs' right to the possession of the goods under their mortgage. In such an action appellant could not intervene without showing that she had some interest in or relation to the property upon which the law could recognize her right to appear for and protect it from going even temporarily into the wrongful possession of another. In this respect there is an analogy between the qualifications of an intervener and one entitled to attack a conveyance as fraudulent. A general creditor, either contract or judgment, may not do it. He must first become interested in the particular property he desires to reach, by attaching his claim to it. In case of real estate, this may be done in this state by docketing a judgment in the proper county, or, in case of personal property, by levying an execution or attachment. The property involved in this case was personal

property, and we do not think that appellant, as a judgment creditor merely, was entitled to intervene."

We think it is unnecessary to extend the discussion on this subject. We cannot see that there is any room for contention that the Idaho Supreme Court decisions and Section 3408 should not be construed as we contend they should be, and it was for that reason the Trial Court based its decision upon other grounds which, as this Court has expressly held, were unwarranted and untenable and cannot be sustained under the accepted rules governing general creditors' suits. Certainly there is nothing about this case that calls for the application of a new doctrine that is subversive of the settled law of the State.

Your Petitioner on its Claim for Deficiency is Entitled to Share in Proceeds from Property Not Covered by Mortgage.

In the event it should finally be held that your petitioner's mortgage was subject to contest by appellees, and that it did not cover the property which was sold and the proceeds from which constitute what is known as the "Unsecured Creditors' Fund," then your petitioner respectfully insists that it is entitled to share, with appellees on its claim for deficiency, pro rata the proceeds in that fund, for clearly your petitioner cannot be charged with laches for failure to intervene in the foreclosure suit, and it has not been guilty of any conduct that would empower the court to forfeit (if that were under any

circumstances possible) its right to share in that fund.

Your petitioner in good faith claimed all the property under its mortgage, and it has sought to establish the lien of its mortgage against all the property, but should it fail to do so there can be no authority for penalizing it and placing it in the class with the creditors who did not appear in the foreclosure suit. Certainly, as a general creditor, it is entitled to share with Towle, Hahn, Shank and the executors of the McClelland Estate. We can conceive of no theory upon which, if the general creditors are divided into classes, your petitioner should not be placed in the class with those who intervened in the foreclosure suit, for surely your petitioner has not been guilty of laches in pressing its claim, and it has done nothing that can justify a discrimination between it and the intervening creditors. The fact that it laid claim to all cannot deprive it of its proportionate part.

Your petitioner, however, while claiming the right to share with the intervening creditors in the unsecured creditors' fund, in the event all the general creditors are not entitled to share in such fund, does not concede the right of the Court to distinguish between the intervening creditors and the other general creditors who have filed their claims in the receivership suit and relied upon the receiver and the court to protect their rights and assemble the assets of the insolvent debtor. And we shall next consider those parts of the decision which give a preference to the intervening creditors over other creditors.

Intervening Creditors Not Entitled to Preference

This court says in its opinion (p. 15):

> "The receiver in the present suit therefore held all of the personal property of the insolvent corporation to which the trustee's lien did not apply, for the benefit of the complainant in the receivership suit and for such of the general creditors of the insolvent debtor as should join therein. So far as appears all such general creditors did so join except the appellant American Water Works and Electric Company."

The Court is certainly mistaken as to the facts shown by the record. All the creditors had filed their claims in the Receivership suit, but only four of them came into the foreclosure suit. The Receivership suit had not been consolidated with the mortgage foreclosure suit and there had been no extension of the Receivership proceedings over the foreclosure suit or for the benefit of the mortgagee. The Receiver was acting exclusively under his appointment in the general creditors' suit, and none of the general creditors had been made parties to the foreclosure suit, except Guy I. Towle, and Carl J. Hahn. The latter had a judgment which it was believed was a lien on some of the real property covered by the mortgage. So far as the record shows, none of the other general creditors had any knowledge whatever of the foreclosure suit, although it seems to have been well understood among the creditors that all the assets of the corporations were subject to a large

mortgage. The status of the proceedings and the attitude of the creditors is well stated in the brief of appellees on behalf of the intervening creditors, as follows, (p. 42):

> "But four creditors from the general creditors' suit sought an opportunity at the last moment, after the receiver had failed and neglected to represent them, to intervene in the foreclosure suit, an entirely different and distinct suit, and wrest from the mortgagee certain property which otherwise would have gone to the mortgagee, not to the general creditors in the receivership suit."

And again, (pp. 92-96):

> "No receiver was appointed in the case at bar. The receiver was appointed in an altogether different suit, started six months prior to the commencement of the foreclosure suit. * * Many creditors filed their claims in the receivership suit. The creditors merely allowed their claims to lie on file in the receivership suit. This condition existed for several months in the receivership suit. For several months the creditors in the receivership suit did not even take the trouble to prove their claims in the receivership suit, as they supposed that the lien of the deed of trust of the Equitable Trust Company would take all of the assets of the insolvent debtor, and it was supposed that the creditors in the receivership suit, except the secured creditor, the Equitable Trust Company of New York, would

get only two or three per cent. on their claims and possibly nothing whatever. * * *

"At the time this foreclosure case was brought, and practically down to the date of the trial of this foreclosure case, it was supposed by all the creditors that the Equitable Trust Company of New York could take all of the property of the insolvent debtor to satisfy its deed of trust. So general was this supposition among the creditors in the receivership suit that the creditors in the receivership suit did not even take the trouble to prove their claims in the receivership suit."

Now note—Is their conduct open, fair and frank, and consistent with the theory of the general creditors' suit in which these same parties had sought protection, and secured the approval and allowance of their claims?

Continuing they say:

"Then, just a few days before the trial in the foreclosure suit, L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, upon an examination of the bill of complaint, discovered to their agreeable surprise, what no other creditor had found, that there was a defect in the deed of trust and one of the supplemental mortgages, then being foreclosed in this foreclosure suit, to-wit: that the deed of trust and supplemental mortgage though covering personal property which was not a constituent part of a public service corporation's

plant and not necessary for the maintenance, operation and repair of the said plant, had not been executed with the formalities required by the statutes of the State of Idaho. * * *

"Thereupon this claimant immediately called this discovery to the attention of the other *three claimants*, the Towle claim, the Hahn claim and the Shank claim. * * * Immediately the McClelland claim was proved in the receivership case, and the three other claimants proved their claims in the receivership case, having first notified the receiver. (It should be noted that no notice had ever been given the creditors to make proof of claims or to object within any fixed date to the claims of other creditors, and the approval of these four claims was *ex parte* with notice only to the receiver.) * * The claims were duly allowed and approved by the court. * * *

"The court thereupon allowed the claimant to intervene in the foreclosure suit. The procedure upon the Shank claim was practically the same. These interveners did not delay the trial but filed their answers immediately.

"The parties immediately proceeded to trial in the foreclosure suit * * * These *four* claimants were the only creditors that had been diligent enough to prove their claims in the receivership suit, were the only creditors that attempted to assert their rights in the foreclosure suit. * * *"

It should be noted that these intervening creditors made the "discovery" on the eve of the trial of the foreclosure suit; that they did not communicate their information to any of the other creditors or to the receiver; that they did not request the receiver to make a claim to the property on behalf of all the creditors; that they did not seek to intervene and make the contest in the foreclosure suit on behalf of all the creditors in harmony with the theory of the general creditors' suit, which Towle had previously brought, and in which they had all filed their claims and sought relief; but they intervened in the foreclosure suit solely for the purpose of obtaining an advantage for themselves and over the other creditors. It should be noted also that not until December 24th following did the Court fix a date when the creditors should make proof of their claims and file objections to each other's claims, and it then fixed February 14th, 1916 (Rec. p. 346.)

We have found no precedent for relief being extended by courts of equity in such cases. The intervening creditors and all other creditors were represented by the receiver, and whatever contest was necessary should be made by the receiver on behalf of all the creditors. In this case the contest was made by the receiver as well as by these intervening creditors (Record, bottom of page 181 and top of page 182). But the trial court held that while the intervening general creditors could attack the mortgage the receiver, who represented all the creditors could not attack it, or, in any event, it awarded the

proceeds of the property to the intervening creditors and not to the receiver.

In our original brief (pp. 19-20, 25, et seq.) and in our reply brief the authorities on this phase of the litigation are cited and quoted from at length, and we shall not extend the discussion here. But we earnestly insist that there is no precedent for such discrimination between creditors and no authorities supporting it have been cited either by this Court or the trial Court, and we confidently assert that none can be found; for such action seems totally inconsistent with both law and equity, and we can conceive of no reason why the conduct of the intervening creditors in concealing their information from the other creditors and making the contest solely on their own behalf should so strongly appeal to any court as to establish a precedent here that cannot be followed in other cases and must soon be overruled by this Court.

If the Receiver or his counsel were unwilling to make a proper contest, which certainly is not the case here, the court could have appointed other counsel or allowed one or more of the creditors, at the expense of the receivership estate, to make the contest by their own counsel for the benefit of all creditors. Manifestly when the claim of the mortgagee to take the property was decided adversely to it, the property remained as theretofore in the possession of the receiver in the general creditors' suit. And neither this Court nor the trial Court has shown how or by what authority the court in the foreclosure suit could reach over into the general creditors' suit and

take from the receiver in that suit property not covered by the mortgage and sell it in the mortgage foreclosure suit for the benefit of a few general creditors whose claims had been filed in the Receivership suit.

We submit, therefore, that if any of the defendants or parties to this litigation could contest the mortgage it must be the receiver for and on behalf of all creditors, and not a few general creditors who "slipped by night," as it were, out of the general creditors' suit into the foreclosure suit on the eve of the trial and seized property of the common debtor to which they previously had no greater right than other general creditors, and which was at the time in the possession of the receiver, appointed at their instance and in their behalf.

There are seemingly other errors in the opinion in the statement of the facts, but as they relate largely to the intervention of the American Water Works and Electric Company and to matters that properly concern the Intermountain Electric Company, the Thousand Springs Power Company and the Guaranty Trust Company of New York, whose appeal appears to have been entirely overlooked by the court, we shall not discuss the matter here.

In conclusion, we most earnestly insist that the decision of this court is in conflict with the decisions of the Supreme Court of the State of Idaho on the construction of local statutes; that the facts were seemingly not made clear to the court and the statement thereof in the opinion seems unfair to the Court and prejudicial to the parties; that the decision ap-

parently rests on principles not heretofore sanctioned by courts of equity in the administration of assets of insolvent debtors in general creditors' suits; that the reasons for granting a rehearing and considering further the facts and the questions of law and equity involved far outweigh anything that can be urged against changing the decision.

Respectfully submitted,

JAMES H. RICHARDS,
OLIVER O. HAGA,
J. L. EBERLE,

Solicitors for Petitioner, The Equitable Trust Company of New York.

STATE OF IDAHO, }
County of Ada. } ss.

I, OLIVER O. HAGA, of counsel for petitioner above named, do hereby certify that in my judgment the foregoing petition is well founded, and that it is not interposed for delay.

Dated November 17, 1917.

OLIVER O. HAGA,
Solicitor and of Counsel for Petitioner.